90-1506

Supreme Court, U.S.
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No.

In The Supreme Court of the United States

October Term, 1990

Kathleen Shetler Globus, Petitioner

v.

Samuel F. Skinner, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Phillip R. Kete
Counsel of Record
7216 Spruce Ave.
Takoma Park, Md. 20912
(301) 891-2295

QUESTION PRESENTED

Whether a presumption of reprisal should be created upon proof that an employee was denied placement in a position in lieu of separation reasonably soon after she was identified by management as the "ringleader" of a "women's lib" Title VII suit, or whether the prima facie case include proof that either there was no hiring freeze or the necessary exemption was obtained?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kathleen Shetler Globus respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. p. 1a) is unreported. The main opinion of the district court (Revercomb,

D.J.) (App. 4a) is reported at 721 F.Supp. 329. The district court's order denying a motion for reconsideration (App. 33a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 1a) was entered on August 13, 1990, and a petition for rehearing was denied on November 30, 1990 (App. 44a). On February 15, 1991, Chief Justice Rehnquist extended the time for filing this petition to March 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

> 42 U.S.C. § 2000e-3(a). It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an

> unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
>
> 42 U.S.C. § 2000e-16(a) All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

1. *Introduction*. This petition is filed because the District of Columbia Circuit, in conflict with most of the other circuits, requires Title VII reprisal plaintiffs in certain types of cases to proof more facts than are necessary to justify a presumption of reprisal.

the plaintiff, Ms. Shetler[1], met the standards for creating a presumption that her reduction in force separation in 1983 was an act of reprisal for her being, in agency management's words, the "ringleader" behind a "women's lib" Title VII class action suit, the court found this presumption did not extend to the decision to not offer Ms. Shetler a particular vacancy in lieu of separation. In conflict with the rule followed in every circuit but the District of Columbia and the Eleventh, the courts below held that the prima facie case as to this decision included proof of the same job-related elements as are contained in the ordinary sex or race discrimination prima facie case. The courts accepted

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[1] As noted in the district court opinion, plaintiff used her maiden name, "Shetler," while working for the agency, and that appellation was reflected in the various exhibits and the trial testimony. App. 5a n. 1. For convenience, it is continued to be used here.

the agency's argument that this meant Ms. Shetler had to prove that there had been exemption requested to a facially inapplicable hiring freeze, that she had failed to adequately do so[2], and thus was not entitled to judgment even in the absence of an articulated reason for not offering her the job.[3]

Certiorari review is sought because the D.C. Circuit rule, followed by the

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[2] Ms. Shetler's evidence on the point was limited to showing that neither of the hiring freezes identified in the record applied to offering vacancies in lieu of reduction in force separation, that the agency had a policy of offering vacancies in lieu of reduction in force separation notwithstanding the purported freezes, and that twelve of her colleagues (who had not been repeatedly denounced by top management as women's lib litigation ringleaders) had been offered vacancies without any evidence of freeze exemptions having been obtained.

[3] The district court did, alternatively, find the agency had articulated legitimately reasons for not offering Ms. Shetler the position. App. 41a-42a, discussed below. These were generally left undefended at the court of appeals, which limited its affirmance to the sole ground of failure "to establish a prima facie case concerning the availability of such a position." App. 1a.

courts below, conflicts with the rule followed in the other circuits, and fails to reflect a proper understanding of the nature and role of presumptions in Title VII litigation. We discuss below the conflict among the circuits and the need for a definitive resolution by this Court (see pages 29 *et seq.*, below). First, however, we briefly describe the findings and conclusions of the courts below.

2. *The District Court's Findings.* Ms. Shetler was removed in a reduction in force in 1983 from her GS 13 position in the Maritime Administration ("Marad"). An administrative claim before the Merit Systems Protection Board that the separation was a reprisal for earlier activity protected by Title VII was unsuccessful,[4]

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[4] Reprisal against a federal employee for exercising Title VII rights is itself a Title VII vi-

and Ms. Shetler exercised her right to a trial de novo in the District Court. 5 U.S.C. § 7703(b)(2); 42 U.S.C. § 2000e-16(c).

The court found that Ms. Shetler's supervisor regarded her as a productive employee of the Office of Maritime Labor and Training and had consistently rated her highly,[5] App. 17a; that she had been involved in class action Title VII litigation charging systematic race and sex discrimination by the Maritime Administration, App. 5a; and that her case centered around the "alleged animus toward her by Mr. Russell Stryker,

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olation. *Smith v. Horner*, 846 F.2d 1521, 1524 (D.C.Cir. 1988).

[5] Mr. Arthur Friedberg, the head of that office, testified specifically that Ms. Shetler was a valued member of his staff, that her removal was not a matter of getting rid of a useless function, and that her performance was always better than satisfactory--i.e., it was commendable or outstanding. App. 49a-50a.

associate administrator for policy and administration, who reported to Admiral Shear, administrator of Marad." App. 5a.

A few months after trial in the class action, the duties of one of Ms. Shetler's colleagues were eliminated and, simultaneously, the office's ceiling was reduced by one. App. 8a. To accommodate the ceiling reduction, Ms. Shetler's position (rather than the position which no longer had any duties) was abolished. App. 7a-8a. A GS 6 typing position was vacant in another office, and Ms. Shetler was offered it in lieu of separation. App. 52a. She accepted the offer, App. 52a, but shortly before the RIF effective date one of her office colleagues unexpectedly resigned, bringing the office down to ceiling by attrition, and the

abolition of Ms. Shetler's position was therefore cancelled. App. 9a.

The 1983 RIF was set in motion several months later, prior to the final decision in the class action. App. 63a. A decision was made to reduce the agency's employment from 1,054 in early 1983 to ceiling to 993 effective October 1, 1983. App. 9a. Although attrition actually brought employment down to 994 by the end of June of that year, App. 63a, Ms. Shetler's position and those of several other employees were nevertheless abolished. The consequence of going through with the reduction in force was that the agency reached October 1, 1983, with 956 employees and over 30 vacancies. App. 63a. Ms. Shetler's claim is that the failure to offer her one of those vacancies, specifically, a position in the clerical reserve pool, was an act of

reprisal for her activity in support of the earlier class action litigation.

a) Prima facie case of reprisal in decision of grudge-holding manager to separate whom he characterized as "ring-leader" of "women's lib" class action.

The court found that Ms. Shetler had made out a prima facie case of reprisal in her separation based on the temporal proximity of her protected activities and decisions adverse to her, evaluated in light of the substantial direct evidence of reprisal animosity on the part of Mr. Russell Stryker:

> [T]he Court concludes that the plaintiff succeeded in making out a prima facie case of retaliation. . . . [I]t is notable that the plaintiff was first told that she would be laid off in the 1982 RIF only a few months after the trial in Harrison, even though this no-

> tification was later cancelled. Because the date of the first RIF certainly was close enough to make out a prima facie case of retaliation, the Court believes that the fact the plaintiff was laid off in the next RIF also is enough to establish a prima facie case.
>
> * * *
>
> Finally, the plaintiff helps prove a prima facie case of discrimination by citing negative comments by Mr. Stryker and Mr. Friedberg regarding EEO activities. Although the officials did not take any adverse action against the plaintiff when they made the comments, the statements themselves help connect the plaintiff's EEO activity and her dismissal enough to help establish a prima facie case.

App. 27a-29a.

As the court noted, Mr. Stryker was not only upset by Ms. Shetler's leadership in the class action litigation, but he took the trouble to complain about her both to her supervisor and at his own weekly senior staff meetings:

> The plaintiff and other witnesses testified that Mr. Stryker was displeased with Ms. Shetler's EEO activities and about the **Harrison** litigation in generally. He occasionally made unfavorable comments about her to her supervisor and often mentioned her at weekly staff meetings during the **Harrison** litigation.

App. 6a.

What specifically Mr. Stryker repeatedly said to his senior staff (who included both the personnel director and Mr. Jack Mann, the official whom the agency identifies as having made the decision not to offer Ms. Shetler the vacancy at issue here[6]), was that the **Harrison** litigation was a "women's lib" project, and that Ms. Shetler was its "ringleader." App. 46a-48a.

The evidence established, moreover, that Mr. Stryker was willing, if neces-

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[6] "[T]he decision whether to fill a vacant position lay . . . with Jack Mann, the manager who had the vacancy." App. 64a.

sary, to await a propitious moment to get back at those he deemed his enemies:

> QUESTION: Do you know the extent to which Mr. Stryker would quickly forgive his enemies or forget the grounds of animosity?
>
> CAPT. WHITCHER: To the best of my knowledge, he never forgave anybody anything.
>
> * * *
>
> THE COURT: He said he didn't think that he would ever forgive anybody for anything they did adverse to him. He held a grudge a long time, I guess.

App. 46a.

Indeed, the agency does not dispute that, in violation of the Age Discrimination in Employment Act, Mr. Stryker used the same 1983 RIF to oust an older manager and replace him with Mr. Mann.[7] Pl.Exh. 475 at 142.

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[7] It was also undisputed that Mr. Stryker involved himself in personnel decisions of his managerial subordinates, even as to the filling of clerical positions. App. 48a-49a.

b) Ms. Shetler could not have been separated but for the decision to not offer her a vacancy.

Ms. Shetler's complaint was that she had been separated as an act of reprisal for her protected Title VII activities. Throughout the litigation, both parties recognized that the abolition of Ms. Shetler's position was not sufficient to accomplish this end.[8] The complicated reduction in force procedures in the federal civil service, 5 C.F.R. Part 351 (1983), have the effect of eliminating any one-to-one correspondence between an

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[8] The court concluded that the agency rebutted the presumption that the overall reduction in force, the reduction in the ceiling in Ms. Shetler's office, and the abolition of Ms. Shetler's position were motivated by reprisal, by providing testimony of non-retaliatory reasons for each of these decisions. App. 30a. The court concluded, further, that Ms. Shetler did not prove these articulated reasons to be unworthy of credence. App. 30a. The court's errors on these points are not subject to this petition.

employee's position being abolished and his or her being separated; through arcane "bumping" and "retreating" procedures, it may well be that employee Smith's position is abolished but employee Jones goes out the door (with Smith taking the Jones position). In addition, and central to the present case, the civil service regulations allow, but do not require, an agency to offer vacancies in lieu of separation to employees whose positions have been abolished, 5 C.F.R. § 351.201(b) (1983). That is, the decision whether to offer a vacancy in lieu of separation stands on the same ground as the decision whether to abolish a position: it lies within the sole discretion of the agency, unconstrained by civil service regulations, but subject to Title VII requirements that the decision

not be made for discriminatory or reprisal reasons.[9]

Thus, abolishing Ms. Shetler's position would not result in her being separated unless either (a) there was no vacant position which she could be offered or (b) the agency exercised its discretion to not offer her to an otherwise available position. This discretion could be exercised either by a blanket policy for or against offering vacancies, or by case by case exceptions to a general policy. In the RIF affecting Ms. Shetler, the Maritime Administration had adopted a policy of offering vacancies to

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[9] If the decision were not within the agency's discretion, that is, if the civil service regulations either barred or required offers of vacancies, Title VII could not be involved. If the agency failed to offer a vacancy, but such an offer would violate the RIF regulations, Title VII would not be violated. If the agency failed to offer a vacancy even though the particular offer was mandated by RIF regulations, the employee would have a complete remedy without having to prove illegal animus.

qualified[10] employees whose jobs were abolished:

> PLAINTIFF'S FOURTH INTERROGATORY No. 20(a): In the 1982 or 1983 reduction in force was any employee offered a vacancy even though he or she had not been determined to be entitled to displace an employee at or below the grade of that vacancy?
>
> RESPONSE: Yes. It is MarAd's policy to offer authorized vacancies to employees whose positions would be affected by RIF, provided they meet the qualifications requirements for those vacancies.

App. 59a.

Among the twelve of Ms. Shetler's headquarters colleagues who were offered vacancies in the 1983 RIF were Mr. John Faruki, a GS 14 who was offered a GS 4

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[10] Ms. Shetler had been offered a typing vacancy in 1982, in lieu of separation, only upon the personnel director's express finding that she was qualified for clerical jobs. App. 51a-52a. Moreover, under civil service regulations, qualifications requirements can be waived when considering employees for vacancies in lieu of separation. App. 50a.

clerk-typist position, Rona LaPrade, a GS 12 who was offered a GS 6 secretary (typing) position, and Alvin Foltz, a GS 12 who was offered a GS 4 clerk-typist position. App. 61a.

c) Determination by district court that Ms. Shetler's prima facie case failed for lack of proof that the concededly existent position was "available."

The court concluded that Ms. Shetler failed to make out a prima facie case of reprisal in failing to be offered a vacancy because she had failed to prove the availability of the clerical position in question:

> There is no evidence that such a clerical position was available. Plaintiff points only to the general testimony that one of the four clerical positions

> exempt from the 1983 RIF was vacant at the time of plaintiff's termination. Plaintiff then asks the court to "infer that the [defendant's] office had determined that the vacancy was going to be filled." The Court will not indulge plaintiff in this inference. Ms. Globus and her counsel had the opportunity to develop direct testimony regarding the alleged vacancy at trial. In the absence of such evidence, this Court will not "infer" an essential element of plaintiff's case after trial.

App. 40a-41a (footnote omitted).

d) Although a vacancy concededly existed, "availability" was defined as depending on whether an exemption from a hiring freeze was necessary and had been obtained.

The agency freely admitted that among the more than 30 vacancies which existed concurrent with the RIF was the clerical job in dispute here:

> [T]he existence of a clerical vacancy is uncontradicted . . .

App. 64a.

What the agency explained was that the clerical vacancy in question was not available, within the meaning of its policy to offer vacancies in lieu of separation, because Ms. Shetler had failed to prove that an exemption from an alleged hiring freeze had been obtained in order to fill it[11]:

> Although the existence of a clerical vacancy is uncontradicted, at least four other points, critical to appellant's case were in dispute: 1) whether MARAD requested an exemption from the hiring freeze to fill the position; . . .

App. 64a.

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[11] The agency identified the following additional points as being in dispute: "2) whether appellant was a qualified typist; 3) whether appellant was entitled to the position; 4) whether the failure to offer appellant the position was due to an illegal, retaliatory motive." App. 64a.

The trial record did contain two distinct personnel freezes. One, dated April 16, 1982, was entitled "Civilian Hiring Freeze." App. 62a. On its face it only barred "hires of persons from outside [Department of Transportation]," and it specifically excluded "Personnel actions resulting in the movement of employees within the Department." App. 62a. The effect of this freeze was to reserve vacancies for those, like Ms. Shetler, who were already inside the agency, unless Marad obtained a departmental exemption in order to recruit from the outside.

The other freeze, which went into effect July 1, 1983 was expressly designed to facilitate, rather than restrict, the filling of vacancies by current employees whose own positions were being abolished:

> A personnel action freeze was implemented on July 1, 1983. Vacancies could not be filled after that date unless employees who were scheduled to be affected by RIF were selected for those vacancies. There were successful placements; for example, Code 500 agreed to make offers to vacant positions to 4 employees who would have either bumped other employees or who would have been separated by RIF. Other vacancies were filled in the same manner. . . .
>
> We continue to make . . . every effort to place affected employees within MARAD.

App. 60a.

e) Lack of evidence that any exemptions were requested from any hiring freeze in order to offer vacancies to employees affected by the RIF.

There is no doubt that twelve of Ms. Shetler's headquarters colleagues were offered vacancies during the 1983 RIF (including three offers involving demo-

tions comparable to that sought by Ms. Shetler):

		vacancy offered]
GS-9	Thomas, P.	GS-7 Secty (Steno)
GS-11	Bryant, Memphis	GS-8 Trade Route Asst
GS-14	Ledbetter, Roscoe	GS-13 Contract Spec
GS-7	Higbee, Ann	GS-6 Secty-typing
GS-7	Watson, Carol	GS-5 Accountant
GS-6	Hawkins, Beverly	GS-6
GS-4	Byers, Cheryl	GS-4 Clerk-typist
GS 9	Isaac, Joyce	GS-6 Secty (Steno)
GS 12	Foltz, Alvin	GS 4 Clerk Typist
GS 7	Washington, Y	GS 6 Subs Rate Asst
GS 12	Laprade, Rona	GS 6 Secty (Typing)
GS-14	Faruki, John	GS-4 Clerk Typist

App. 61a.

As with the position claimed by Ms. Shetler, with respect to each of these vacancy offers there is no evidence one way or the other "whether MARAD requested an exemption from the hiring freeze to fill the position," App. 64a. In accepting the agency's claim Ms. Shetler had failed to prove the availability of the clerical reserve pool vacancy, however, the courts below, accepted the agency's argument that proof of exemption from the hiring freeze was essential.

f) Alternative findings -- rejected by court of appeals -- that prima facie case was rebutted by reasons in fact never articulated by the agency.

Alternative to the finding that Ms. Shetler's prima facie case depended on

proof that an exemption to a facially-nonapplicable freeze had been obtained, the district court held that the agency had articulated three reasons for failing to offer the job and that Ms. Shetler had failed to discredit any of them:

> [E]ven if plaintiff had succeeded in establishing a prima facie case, plaintiff has not proved that defendant's reasons for failing to offer plaintiff a clerical position were merely pretextual. . . . [A]s all parties agree, defendant had no obligation to offer plaintiff another position. Defendant reasonably believed that plaintiff would not accept a lower clerical position since she had previously rejected a similar demotion when faced with termination resulting from a reduction in force in 1982. Defendant also introduced testimony that indicating that demotion of a relatively high level employee, such as plaintiff, to the level of GS 6 would create obvious managerial problems.

App. 34a.

Only the first of these was defended by the agency on appeal, it having been

the reason which the agency's pre-trial submissions had indicated would be testified to. As it happened, however, that testimony was never offered.[12]

The other alternative explanations were so bizarre that they were abandoned by the agency on appeal.[13] There had been no testimony, nor any other evidence whatsoever, regarding problems that substantial demotions might imply; other than the fact that other employees, i.e., employees not denounced by the Mr.

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[12] As this Court has emphasized, a presumption can be rebutted only by evidence actually admitted at trial, not by statements of counsel:

> An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n. 9 (1981).

[13] As will be seen, the court of appeals declined to consider them when affirming the court's judgment. Below, p. 27-8.

Stryker as the women's lib lawsuit ringleader, were offered substantial demotions in lieu of separation,[14] the question never arose in any manner or form before, during, or after the trial. And, although Ms. Shetler had indeed been offered a demotion to a clerical position when faced with termination in 1982, she had accepted the offer, not rejected it.

3. *Court of Appeals decision.*

Ms. Shetler noted an appeal, but before briefing was scheduled the agency filed a motion for summary affirmance. The motion was granted by a short, per curiam, unpublished order.[15] The court

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[14] It should be noted that such demotion carried no loss of pay, 5 U.S.C. §§ 5362, 5363, and that by the time of the trial in this case every single employee who had been demoted in the RIF had been re-promoted to his or her former grade.

[15] This Court has no policy against reviewing unpublished or summary court of appeals decisions. Transamerican Freight v. Brada Miller, 423 U.S. 28, 34, 46 L.E.2d 169 (1975); Lego v.

affirmed on the sole ground that Ms. Shetler had failed to prove the availability of the position:

> ORDERED that the motion [for summary affirmance] be granted substantially for the reasons stated by the district court in its Findings of Fact and Conclusions of Law, filed September 13, 1989, and Order, filed November 29, 1989. . . . We affirm the district court's conclusion regarding the agency's failure to offer appellant a position in lieu of separation solely on the ground that appellant failed to establish a prima facie case concerning the availability of such a position. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

App. 1a.

A petition for rehearing was denied, App. 3a, and a suggestion for rehearing en banc was declined.

In essence, the agency's position, endorsed by the courts below, is that the

presumption that the agency acted for reprisal reasons in separating Ms. Shetler did not apply to the decision to not offer her an authorized vacancy because--as to this portion of the decision to separate--the plaintiff's prima facie case includes proving that the identified authorized vacancy has been exempted from a hiring freeze which is facially inapplicable to it.

REASONS FOR GRANTING THE PETITION

The courts below resolved erroneously a question of great importance to the administration of anti-discrimination laws, in conflict with the decisions of other courts of appeals, and inconsistent with this Court's Title VII and presumptions jurisprudence.

In a series of Title VII discrimination cases, this Court judicially created a rebuttable mandatory presumption[16] of discrimination upon the proof of a set of facts--a prima facie case--whether or not the trier of fact would necessarily infer

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[16] Technically, "mandatory rebuttable presumption" is redundant. By definition, an ordinary presumption is mandatory and rebuttable. What is referred to as a "presumption of law," is irrebuttable. On the other hand, if the effect of the evidence is nothing more than that the jury is allowed to infer the fact in issue, there is an inference but not a presumption.

discrimination from those facts. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This Court has not, however, ever addressed whether such a presumption can be created in a Title VII reprisal case.[17] As will be shown, this Court's Title VII jurisprudence clearly demands recognition of a reprisal presumption and clearly what the elements of a prima facie case of reprisal should be.

The District of Columbia Circuit and the Eleventh Circuit allow presumptions to be created in reprisal cases, but take an idiosyncratic view of the elements of the prima facie case, adding to the stan-

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[17] This is not surprising: "[B]ecause of irregular fortuity in presentation of presumption cases to the top court, there are quite sure at all times to be important and embarrassing gaps even as to well established presumptions in any classification schemes." Maguire, *Evidence, Common Sense and Common Law*, 188 (1947).

dard reprisal elements the elements of what would be a prima facie case of simple race or sex discrimination. In addition, a few decisions scattered among the circuits effectively reject the possibility of a presumption of reprisal at all, holding that the employer has nothing to rebut unless the plaintiff actually convinces the trier of fact that reprisal was the employer's motive. Thus, how allegations of Title VII reprisals are litigated is determined both geographically and by the luck of circuit court panel appointments.

Ms. Shetler's evidence established a prima facie case of reprisal as defined by most panels in every circuit but two. This arbitrary distinction is unnecessary and, by this Court, easily correctable. It should be corrected because the confusion not only increases the

likelihood of erroneous decision-making, but wastes the time, attention, and efforts of the participants (litigants and courts)[18] in a substantial area of federal litigation.[19]

A. The Conflict Among The Circuits Requires Resolution By This Court.

All twelve of the geographical circuits[20] say that reprisal cases are governed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas*

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[18] "Each party and the court must know where [the burden of introducing evidence] rests ar every stage of the trial . . . " Morgan, *Tot v. United States: Constitutional Restrictions on Statutory Presumptions*, 56 Harv. Law Rev. 1324, 1325 (1943).

[19] Between 1984 and 1988, around 9,000 employment discrimination cases a year were filed in the federal district courts. *Annual Report of the Director of the Administrative Office of the United States Courts, 1988*, 185.

[20] The U.S. Court of Appeals for the Federal Circuit has jurisdiction over a range of federal government employment cases, but those involving Title VII are expressly excluded from that jurisdiction. 5 U.S.C. § 7703(b)(2).

Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). All go on to recite that the plaintiff is to prove certain facts--the prima facie case; then the defendant must rebut that case by introducing evidence of a legitimate non-reprisal reason for its decision; and then the plaintiff has an opportunity to prevail by showing the articulated reason to be unworthy of credence. The circuits are unanimous in reciting that the elements of a reprisal prima facie case are that the plaintiff prove (1) that she engaged in protected activity, (2) that she suffered an adverse employment decision, and (3) that there is a causal connection between the two.[21] In practice, however, three radically different approaches are followed. First, in the majority of

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[21] This formula seems to have originated with *Hochstadt v. Worcester Foundation, Etc.*, 425 F.Supp. 318, 324 (D.Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976).

cases, the courts (correctly) find prima facie reprisal upon proof that the employee engaged in protected activity, the employer knew of the activity, and the employer made an adverse personnel decision within a short enough time that anger at the employee's actions would not have been completely attenuated.

Secondly, the District of Columbia Circuit and the Eleventh Circuit define the prima facie case by adding to the basic reprisal formula the elements of the simple discrimination prima facie case (other than membership in a protected group). *Williams v. Boorstin*, 663 F.2d 109, 116-17 (D.C.Cir. 1980); *Mitchell v. Baldridge*, 759 F.2d 80, 86 n. 5 (D.C.Cir. 1985); *Canino v. United States EEOC*, 707 F.2d 468 (11th Cir. 1983); and the present case. Where, as here, the reprisal was the failure to offer the plaintiff a

position, those elements are proof that the position claimed by the plaintiff was truly available and that the plaintiff was qualified for the position.

Finally, scattered through the circuits are decisions holding that a prima facie case of reprisal depends on the trier of fact, in the particular case in dispute, determining that in fact reprisal was the employer's motivation. *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986); *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985). This line of cases does not recognize the creation of a presumption within the meaning of *McDonnell Douglas* and *Burdine*.

1. *Most circuit court decisions define the reprisal prima facie case based only on the temporal relationship between protected activity and adverse personnel decision, without adding the elements of an analogous simple discrimination case.*

In a case of simple discrimination (i.e, race discrimination, without any reprisal claim) in hiring, the prima facie case consists of proof: that the plaintiff belongs to a racial minority; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's

qualifications. *McDonnell Douglas*, 411 U.S. at 802.

In reprisal cases, on the other hand, the usual standard for finding a prima facie case is for the plaintiff to prove protected activity and adverse personnel decision, and then to prove, in the name of causality, that the employer was aware of her activity and decided adverse to her reasonably soon after the activity:

> Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected activity and the allegedly retaliatory employment decision. *Miller* [*v.Fairfield Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986)] at 731-32.

Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

Indeed, every circuit has issued decisions holding that a presumption of reprisal is created by an adverse personnel decision following protected activity that the employer was aware of.[22]

Outside the District of Columbia and Eleventh Circuits, job-related issues (e.g., the plaintiff's qualifications for the job and whether the employer in fact intended to fill the vacancy in the first place) are addressed after the prima facie case of reprisal is established, as part of the employer's rebuttal and the employee's attack on that rebuttal.

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[22] *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 (1st Cir. 1989); *Davis v. State Univ. of New York*, 802 F.2d 638 (2nd Cir. 1986); *Waddell v. Small Tube*, 799 F.2d 69 (3rd Cir. 1986); *Williams v. Cerberonics*, 871 F.2d 452 (4th Cir. 1989); *Payne v. McLemore's*, 654 F.2d 1130 (5th Cir. 1981); *Polk v. Yellow Freight*, 876 F.2d 527 (6th Cir. 1989); *Jennings v. Tinley Park*, 796 F.2d 962 (7th Cir. 1986); *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980); *Love v. Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984); *Simmons v. Camden Country Bd. of Educ.*, 757 F.2d 1187 (11th Cir. 1985); and *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

Holland v. Jefferson Nat. Life Ins. Co., 883 F.2d 1307, 1316 (7th Cir. 1989), and *Gonzalez v. Carlin*, 907 F.2d 573 (5th Cir. 1990).

Indeed, outside the D.C. and 11th Circuits, the courts seem to make a point of emphasizing that if a single personnel decision is attacked as both an act of discrimination and an act of reprisal, the two issues are analyzed using differing (and non-overlapping) prima facie cases. *Davis v. Lambert of Arkansas, Inc.*, 781 F.3d 658 (8th Cir. 1986); *Jalil v. Avdel Corp.*, 873 F.2d 710 (3rd Cir. 1989); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), *cert. denied* 455 U.S. 1000; *Gonzalez v. Carlin*, 907 F.2d 573 (5th Cir. 1990); and *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28 (1st Cir. 1990).

Thus, it is settled throughout most of the circuits that the issue which was central to Ms. Shetler's case--whether the vacancy she claimed was truly available--is considered as part of the employer's rebuttal rather than the plaintiff's prima facie case.

2. *The District of Columbia and Eleventh Circuits require proof of the elements of a simple discrimination case as part of the prima facie case of reprisal.*

The rule in the District of Columbia Circuit and the Eleventh Circuit is that a prima facie case of reprisal regarding a decision concerning a particular position does not arise unless the plaintiff proves he or she was qualified for it:

> In cases of alleged retaliatory discharge, failure to hire, or failure to promote, the plain-

> tiff must also show as part of the prima facie case that he was qualified for the position. *Williams v. Boorstin*, 663 F.2d 109, 16-17 (D.C.Cir. 1980); *see also Canino v. United States EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983).

Mitchell v. Baldridge, 759 F.2d 80, 86 n. 5.

We do not dispute that the rule identified in *Mitchell* applies to all aspects of the prima facie case--in our case, it applies to job availability as well as qualifications for the job. The problem is that the *Mitchell* rule is out of line with the approach generally followed in the other circuits. It is this conflict which should be resolved by the Court, particularly because, as will be shown below, the D.C. Circuit rule is wrong.

3. *A significant number of circuit court panels effectively deny any presumption in reprisal cases at all.*

In both the Seventh and the Ninth Circuits there are lines of cases interpreting "prima facie case" as meaning proof that actually convinces the trier of fact that reprisal was one of the reasons for the employer's decision. Thus, one Seventh Circuit case says the plaintiff must satisfy the trier of fact that but for the alleged reprisal he or she would not have been subjected to the challenged employment decision:[23]

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[23] Satisfying the trier that in fact the employer would not have taken the adverse action but for a reprisal motivation does not create a presumption of reprisal, subject to rebuttal by an articulated non-reprisal reason; it establishes the fact of reprisal, entitling the plaintiff to judgment unless the employer succeeds in proving (by a preponderance of the evidence) that it would have made the same adverse decision even absent the reprisal motivation. *Price Waterhouse v. Hopkinss*, 104 L.Ed.2d 268 (1989).

> To establish a *prima facie* case of retaliatory discharge . . . the plaintiff must show: (1) he opposed an employment practice that was unlawful within the meaning of Title VII or he participated in a proceeding under Title VII; (2) he suffered an adverse action by his employer; (3) because of his opposition or participation. *See Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982). The plaintiff must show that the employer would not have taken the adverse action "but for" his opposition or participation. *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 928 (7th Cir. 1984). Successfully establishing a *prima facie* case gives rise to a rebuttable presumption of discrimination.

Klein v. Trustees of Indiana University, 766 F.2d 275 (7th Cir. 1985)

A leading Ninth Circuit case similarly requires proof by a preponderance of the evidence that but for reprisal there would not have been a discharge, before the defendant has any burden of proof or production:

> In this circuit, retaliation claims have arisen most often in the context of an employee's termination, and the causation element in those cases requires the plaintiff to show "by a preponderance of the evidence that engaging in a protected activity was one of the reasons for the firing and that but for such activity the plaintiff would not have been fired." *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 345 (9th Cir. 1982).

Ruggles v. California Polytechnic State University, 797 F.2d 782 (9th Cir. 1986).

As will be discussed in Part C, below, what this Court did in *McDonnell Douglas* and *Burdine* is create what is academically referred to as a "true presumption," one which shifts the burden of production of evidence (without affecting the burden of proof) upon the plaintiff's establishing certain facts, whether or not the trier of fact would infer the ultimate fact from them. The *Klein-Ruggles* line of cases -- whether rightly or wrongly decided -- are not recognizing

true presumptions in reprisal cases, as do the other cases cited above. Instead, they require reprisal plaintiffs to somehow[24] prove facts sufficient to bring their cases within the ambit of *Price Waterhouse v. Hopkins*, 104 L.Ed.2d 268 (1989), with the trier of fact accepting that reprisal was one motivation and that the employer's articulated reason was another and then determining whether the articulated reason would have resulted in the adverse decision even absent the reprisal reason.

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[24] This could most likely succeed where, as here, there is direct evidence of employer anger at the employee's protected activity.

B. Determination of the elements of the prima facie case is necessary even though the case was fully tried, because the employer declined to provide evidence of any legitimate reason but the court refused to presume reprisal animus from the plaintiff's evidence.

An important preliminary question must be addressed, which is how can the question of prima facie case be presented once the case has been fully tried? As this Court has emphasized, at that point the simple question of discrimination or legitimate motives should be decidable. *U.S. Postal Service v. Aikens*, 460 U.S. 711, 716 (1983)

The *Aikens* court did not have before it the situation presented here--with the employer declining to introduce evidence of any nondiscriminatory reason, but the

court refusing to honor the presumption created by the plaintiff's evidence. Here, in contrast to the case in *Aikens*, the decision depends solely on whether the plaintiff's evidence does or does not create a legally binding presumption. If the evidence was sufficient, Ms. Shetler was entitled to judgment despite the district court's honest belief that there must have been some legitimate reason for deciding not to offer her a vacancy in lieu of separation:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254 (footnote omitted).

That presumption is dissipated only by the introduction, through evidence at trial, of the employer's claimed reason, *ibid*. Nothing in *Aikens* suggests that the defendant's mere participation in the trial destroys the legally mandatory inference of discrimination. It is only when "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case," *Aikens*, 460 U.S. at 716, that is, when the defendant has actually "set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 255, that the district court is free to choose between the plaintiff's explanation and whatever non-discriminatory explanations the defendant argues or (as here) appear *sua sponte* to the court.

C. Title VII Policy Dictates Creation Of A Presumption Of Reprisal When Adverse Personnel Decisions Are Made Reasonably Soon After Participation In Protected Activities.

Whether Ms. Shetler's evidence should have created a presumption of reprisal in failing to offer her the position in the clerical reserve pool depends mainly on what a presumption is, and what purposes is serves--a subject notorious for its complexity:

> It has been aptly observed that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof." . . . The lawyer must still grapple with complexities, intricacies and confusions that have enshrouded the subject for generations.

Louisell, *Federal Evidence* § 65 at p. 518 (1977) (footnotes omitted).

At this point, it may suffice to note the three common meanings given the term "presumption," and to stress that what we are concerned with is the mandatory rebuttable type, the presumption which merely shifts the burden of producing evidence. The other two uses of the term must be distinguished from the presumption considered here. The first is,

> the presumption of law, or conclusive or irrebuttable presumption. If *A* is shown, then *B* is to be presumed without question and the court will not even receive evidence or entertain argument to show the nonexistence of *B*. And the court will direct a jury that if they find *A* to be proven they *must* also find *B*. . . .

F. James & G. Hazard, *Civil Procedure* § 7.9 at 253-4 (2nd Ed. 1977.

At the opposite end of the scale are simple inferences, and the court's role in determining whether a jury can be allowed to make a particular inference:

> The word "presumption" is occasionally used to refer to the logical inference of one fact from the existence of another. . . . [C]ourts set limits to the drawing of inferences and will permit juries to draw only those which the courts consider rational.

Ibid., 254-5.

What concerns us here are presumptions of the type created by this Court in *McDonnell Douglas*, what the text authors refer to as true presumptions:

> The word "presumption" properly used refers only to a device for allocating the production burden. It operates thus: If *B* is presumed from *A*, then on a showing of *A*, *B must* be assumed by the trier in the absence of evidence of non-*B*. To put it another way, if *A* is shown, then the party who asserts non-*B* has the production burden on the issue of *B*'s existence or non-existence.

Ibid., 255.

"Prima facie case," in this context, means the evidence necessary to create the presumption, rather than, as in other

contexts, the evidence sufficient (absent a presumption) to resist a motion for directed verdict:

> The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Burdine, 450 at 254 n. 7.

Thus, in defining the prima facie case of reprisal this court is not setting out standards for judging what inferences are sustainable, but determining what evidence should be deemed sufficient so as to require the employer to state in evidence at trial what it contends the true reason for the challenged personnel decision is.

1. A presumption of reprisal should be created by evidence which is rationally connected to reprisal motivation, sufficient to protect employers from trial of frivolous cases, and which respects the relative conveniences in production of evidence.

The authority creating a presumption (in this case, a court) has broad discretion in identifying the elements of the prima facie case. There are, however, two extremes which must, or should, be avoided. In some cases, the elements of the prima facie case so clearly imply the presumed fact that to create a formal presumption is a waste of time:

> In *Hawes v. Georgia*, 258 U.S. 1, the . . . statute provided that when distilling apparatus was found on the premises this should be prima facie evidence

> that the person in actual possession had knowledge of its existence. . . . The inference so accorded with common experience that a statutory provision scarcely was necessary to shift the burden of proof.

Tot v. United States, 319 U.S. 463, 470-1 (1943).

On the other extreme, a presumption is not constitutionally permissible "if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot*, 319 U.S. at 467-8.

In sum, one would not create a presumption where the proven facts necessarily imply the ultimate fact, and one may not create a presumption where the proven facts have no logical relation at all with the ultimate fact. It is in the

broad space between these two poles that the decision is made as to exactly what facts should create the presumption. This is a policy decision, made in light of the other factors going into the creation of presumptions:

> What, then, are the bases upon which courts or legislatures will create presumptions? For the most part they are the same kind of reasons that influence the production burden generally, and these may be summed up as reasons of convenience, fairness, and policy.

F. James & G. Hazard, *Civil Procedure* § 7.9, p 256 (2nd Ed. 1977).

By definition, recognition of proof by way of presumption allows a plaintiff to present a discrimination case in the absence of direct evidence of discriminatory motive[25]; it would hardly make

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25 "The special virtue of the indirect method of proof is that it allows victims of age discrimination to prevail without presenting *any* evidence that age was a determining factor in the employer's motivation." *La Montagne v. American*

sense to demand the equivalent of direct proof in order to make out a prima facie case. On the other hand, it can be easily conceded that the elements of a prima facie case must be sufficiently rigorous to indicate some difference between the case at bar and run-of-the-mill adverse personnel decisions:

> [T]he prima facie burden is a useful barrier that serves to screen out unsubstantiated discrimination charges. The employer is spared unnecessary litigation expense by its ability to file a motion to dismiss, a motion for summary judgment, or a motion for directed verdict where the plaintiff fails to distinguish his or her case from the ordinary, legitimate kind of adverse personnel decision . . .

Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 134 (7th Cir. 1985).

Convenience Products, Inc., 750 F.2d 1405, 1409-10 (7th Cir. 1984).

The final factor relevant[26] to determining the elements of a Title VII presumption is to ensure that, as nearly as possible consistent with the other criteria, the evidentiary burdens fairly reflect the relative access to information:

> Access to evidence is often the basis for creating a presumption. When goods are damaged in a bailee's possession, for instance, the bailee can more easily find out what happened to them than the bailor, so it is fair to presume the bailee's negligence as an initial matter and put to the production of exculpatory evidence if he has any. The owner of an automobile has been means of knowing whether the driver was in his service when it struck the plaintiff than has the plaintiff.

Harper & James, 257.

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26 Professor Morgan has identified a number of other reasons which have caused courts or legislatures to create or recognize presumptions, Morgan, *Basic Problems of Evidence*, 32-33 (1962), but none of these seems applicable to Title VII.

Thus, it is fair to state that a presumption of reprisal should arise from such evidence as would allow serious reprisal allegations to be distinguished from the frivolous, while at the same time allocating the evidence production burdens as nearly as possible consistent with the parties' relative convenience.

2. Placing the burden on the employer of proving impediments to filling a vacant position better serves the purposes of Title VII than does making disproof of impediments part of the plaintiff's prima facie case.

Both the formulation followed in most of the circuits and the formulation followed in D.C. and the 11th Circuit meet the first two criteria identified .

above--they allow plaintiffs to seriously present cases in the absence of direct evidence of reprisal motivation, and they protect employers from full-scale trials where the reprisal claim has no apparent basis.

The D.C. formulation requires that the plaintiff disprove hypothetical reasons for the employer's decision--in this case, that the plaintiff prove the reason was not the existence of a hiring freeze which barred the filling of the clerical vacancy. The majority formulation would disregard such reasons unless and until the employer itself presented some evidence that the alleged freeze was its true reason. It cannot be doubted that the majority formulation better reflects the access to the information as to the employer's true reason:

> [T]he employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof.

Teamsters v. United States, 431 U.S. 324, 359 n. 45 (1977).

To be sure, in simple discrimination cases, reasons related to available vacancies or the employer's evaluation of the applicant's qualifications are made part of the prima facie case. *McDonnell Douglas*, 450 U.S. at 802. But this allocation of proof is in spite of, not because of, estimates of convenience. In a simple discrimination case, the plaintiff must produce evidence directed at possible reasons for his or her rejection because absent that evidence no likelihood of discrimination would appear in the case at all:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [citation omitted]. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In a reprisal case, in contrast, the screening function is sufficiently performed by the reprisal-related elements--proof that the employee engaged in protected activities and the employer reasonably soon thereafter made an adverse

personnel decision. The job-related elements, essential to create a presumption of simple discrimination, are unnecessary to this purpose in a reprisal case. The majority of the circuits are, therefore, correct in treating questions such as job freezes and job qualifications as matters to be raised in the employer's rebuttal, rather than as elements of the plaintiff's prima facie case.

CONCLUSION

A writ of certiorari should be issued to the U.S. Court of Appeals for the District of Columbia circuit, bringing Ms. Shetler's case for review to this Court, so that the judicial confusion over the reprisal prima facie case can be resolved.

Respectfully submitted,

Phillip R. Kete
Attorney for Petitioner
7216 Spruce Avenue
Takoma Park, Md. 20912

(301) 891-2295